IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Café Crema Inc. v. Benevolent Realty Enterprises Ltd.,* 2025 BCSC 664

Date: 20250321
Docket: S40043
Registry: Chilliwack

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Between:

Café Crema Inc.

Plaintiff

And

Benevolent Realty Enterprises Ltd. and
Praedium Property Management Ltd. dba Transpacific Realty Advisors

Defendants

Before: Associate Judge Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	R.K.A. Thomas
Counsel for the Defendants:	M.G. Swanson
Place and Dates of Hearing:	New Westminster, B.C. March 18 and 21, 2025
Place and Date of Judgment:	New Westminster, B.C. March 21, 2025

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[1] **THE COURT:** This is an application for an order pursuant to *Supreme Court Civil Rule* 7-2 for an order that Cheryl Vale, representative of the defendant, be compelled to attend an examination for discovery by Zoom.

[2] The plaintiff operates a café and alleges the defendants breached their agreement to construct an exterior patio and storage area. There is also an allegation of bad faith. The matter is set for a 13-day trial commencing April 7, 2025. The plaintiff is claiming $1.6 million in damages.

[3] The plaintiff alleges that Ms. Vale was employed by the defendants and has first-hand knowledge of all matters in dispute as she was the front-line individual dealing with the matters at the heart of this litigation. This appears to be confirmed by the defendants in their trial brief, where they have listed Ms. Vale as a witness concerning all the issues arising in the litigation and indicate that six hours will be needed to conduct her examination in chief. The plaintiff's first choice of witness to be examined for discovery was Ms. Vale. However, on the first two occasions where she was scheduled to be examined for discovery, the plaintiffs cancelled those appointments. Then for the next two further appointments made to examine Ms. Vale for discovery, Ms. Vale was unable to attend for medical reasons. As a result, and given that the trial was approaching, the plaintiffs chose Mr. Fram as an alternate witness for the defendant to be examined.

[4] The examination for discovery proceeded with Mr. Fram. However, he was unable to answer all the questions asked and, with respect to some questions, he replied, "You would have to ask Cheryl."

[5] During the examination for discovery, he also indicated that he could not remember what the final result was concerning the erecting of the fencing for the storage area. Concerning the construction of the patio, a key issue in the litigation, he indicated his lack of direct knowledge and referenced Ms. Vale as the "point person" on that issue. He also indicated on discovery that he was unaware of the final result concerning the patio, another key issue in the litigation.

[6] The defendants submit that Mr. Fram was not the only alternate as a witness to Ms. Vale. There was also a Mr. Tong, a Mr. Kemal, and a Mr. McKay. The defendant also submits that the plaintiff conducted the examination for discovery without reference to any documents, and had the plaintiff put documents to Mr. Fram during the course of the discovery, the result would have been potentially different. Presumably Mr. Fram could have referenced the documents and provided the required answers.

[7] The defendant also submits that since the examination for discovery, Mr. Fram has provided answers to many of the questions, having subsequently informed himself through reference to the documents and other sources.

[8] The defendant takes the position that a party is entitled to one examination for discovery and there is no right to a second kick at the proverbial can in the present circumstances, and Mr. Fram is capable of informing himself and answering any questions arising.

[9] On March 14, 2025, the plaintiff became aware that Ms. Vale was no longer medically unfit to be examined. As a result, they have demanded she be produced for the purpose of discovery, but the defendants have refused. The plaintiff submits that Mr. Fram has no personal knowledge of key issues and did not provide evidence of what he previously did to inform himself on the issues. Further, the plaintiff alleges that what answers they have received are not satisfactory, and having Mr. Fram inform himself further is not practical, given the impending trial and the fact that follow-up questions are required.

[10] In *Century 21 Canada Limited Partnership v. Real Estate Webmasters Inc.*, 2024 BCSC 518 at para. 101, the court defines when leave for a further examination for discovery to examine a second representative will be granted. The court states:

> [101] The principles to be applied on an application to examine a second representative of a corporate defendant were summarized in *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia (Education),* 2012 BCSC 582 at para. 10 and include the following:

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> 1. there is a discretion to permit a second representative to be appointed for examination for discovery;
> 2. that discretion should be exercised where the party applying shows that the first representative cannot satisfactorily inform himself about the subject of the examination for discovery;
> 3. this is an objective test and is not determined by the view of the examiner;
> 4. in determining whether the first representative can satisfactorily inform himself, the Court should consider:
>   a. the responsiveness of the witness under examination;
>   b. the degree to which he has taken pains to inform himself;
>   c. the nature and materiality of the particular evidence sought to be canvassed;
>   d. the most practical, convenient and expeditious alternative.

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[11] In considering the factors stated in *Century 21*, at para. 101, number 4, I agree that the responsiveness of Mr. Fram was limited by his lack of first-hand knowledge. Subsequent to the examination for discovery, it is clear he did make efforts to inform himself, as is evidenced by his answers provided subsequent in defence counsel's letter of March 14, 2025, which provides 22 responses to questions posed on the examination for discovery.

[12] The plaintiff alleges the responses do not provide the source of the answers, and that the answers provided require further follow-up questions, which would be best put directly to Ms. Vale who has first-hand knowledge. The plaintiff submits this is especially important given the proximity of trial and the lack of time for Mr. Fram to inform himself.

[13] In this regard, the plaintiff relies on *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co.*, 2013 BCSC 1392, where the court states at para. 38:

> [38] The size and complexity of this case, the approaching trial date, the knowledge that Mr. Fuller has with respect to material issues and the artificiality and impracticality of canvassing that evidence through Mr. Russo

> all convince me that this is one of the rare cases where a second representative will be ordered to be discovered. Despite Mr. Russo's cooperation and knowledge, I am satisfied that there are areas about which he cannot, in the circumstances, satisfactorily inform himself.

[14] The plaintiff further submits that the court's decision in *North Star Properties v. B.C. (Transportation and Infrastructure)*, 2014 BCSC 2630, further supports this approach, and at paras. 28 and 29 the court states:

> [28] There is no dispute as to the legal principles applicable on this application. It is appropriate to grant leave to examine a second representative where, given the subject of the proposed examination for discovery and the original examinee's lack of personal knowledge concerning that subject, it is reasonable to anticipate that one question might lead to further questions that would be difficult to identify in advance. In other words, where the original examinee could only answer questions by obtaining information from persons with direct knowledge of the matters in issue to the extent that the process would become so artificial and cumbersome as to deter a legitimate inquiry, a second examination is justified. The key consideration is what is most practical and least expensive in the circumstances.
>
> [29] I am satisfied that Mr. McKenzie does not have personal knowledge of the subjects the plaintiffs wish to pursue and that he could only answer questions by obtaining information from Mr. McConachy. I am also satisfied that it is likely those questions would necessitate follow-up questions. Further, the trial is now just over six weeks away and there is not enough time for a series of questions and follow-up questions. In the circumstances, a second examination for discovery is appropriate. However, it will be limited to questions related to Bramcon's role in the relocation of Windsor's business and the renovations made to the replacement property.

[15] In my view, this is a circumstance which is an exception to the general rule that only one representative of a corporate defendant be examined for discovery. Ms. Vale will be a key witness who has first-hand knowledge of the facts surrounding the key issues arising in this case. The defendants' TMC brief lists her as their most important witness, if that is judged by time, giving an estimated six hours of testimony in chief. Ms. Vale was the plaintiff's first choice as the defendants' representative to be examined for discovery. It was only Ms. Vale's unavailability for stated medical reasons that caused the plaintiff to agree to examine an alternate witness. Ms. Vale's subsequent fitness to provide evidence at trial was only discovered by the plaintiff on March 14, 2025, after the discovery of Mr. Fram.

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[16] Further, although Mr. Fram did subsequently inform himself and reply to those questions put to him on discovery, the plaintiff submits that those answers give rise to further questions and, due to the proximity to trial, it is not practical or efficient to await his further informing himself with a view to providing answers.

[17] The trial is scheduled to commence April 7, 2025, 17 days from now.

[18] Finally, there is an element of unfairness which would otherwise arise, that being a key witness being insulated from being examined for discovery due to medical reasons, only to be subsequently available on the eve of trial to give six hours of testimony in chief. In my view, that is a situation that requires the levelling of the playing field.

[19] I find the plaintiff has met the objective test to permit a second representative to be appointed for an examination for discovery. It is ordered that Cheryl Vale, representative of the defendant, is to attend an examination for discovery to be scheduled in the week of March 31, 2025, when counsel are available, by Zoom or such other method as the parties agree. The discovery will be limited to anything related to requests made at the prior examination for discovery, any questions Mr. Fram could not answer at the prior examination for discovery, and anything arising from prior answers provided at the examination for discovery, or subsequently provided upon Mr. Fram informing himself.

[20] In the materials, it is indicated that although Ms. Vale is medically fit to be examined for discovery, it indicates she is still suffering residual symptoms which require accommodation, such as breaks. In consideration of that need, Ms. Vale will be entitled to reasonable breaks, as required, during the course of her examination for discovery.

[21] Is there anything else?

[22] CNSL R. THOMAS: To costs, I would submit that costs be paid to the plaintiff forthwith, given that trial is coming soon.

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[23] CNSL M. SWANSON: My submission is that costs payable forthwith is not the appropriate result here. Costs should be in the cause.

[24] THE COURT: I agree. The plaintiff will have their costs of the application in the cause.

"Nielsen A.J."

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